REMARKS

Claims 26-29, 31, 33, 34, and 46-49 are pending. Applicants have not amended any claims herein. In light of the following remarks, Applicants respectfully request consideration and allowance of the pending claims.

Rejections under 35 U.S.C. § 112, second paragraph

Claims 26-29, 31, 33, 34, and 46-49 were rejected under 35 U.S.C. § 112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In particular, the Examiner asserted that the term "powder" is indefinite in scope.

Applicant respectfully disagrees. The standard for satisfaction of 35 U.S.C. § 112, second paragraph, is whether "one skilled in the art would understand what is claimed." *See Amgen, Inc. v. Chugai Pharmaceutical Co.*, Ltd. 927 F.2d 1200 (Fed. Cir. 1991). In addition, the Federal Circuit has stated that claims need only "reasonably apprise those skilled in the art" as to their scope and be "as precise as the subject matter permits." *See Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367 (Fed. Cir. 1986). Moreover, MPEP § 2111 states that claims must be given their broadest reasonable interpretation *consistent* with the specification; this interpretation must be *consistent* with the interpretation that those skilled in the art would reach. Importantly, the section goes on to state that the "plain meaning" is the ordinary and customary meaning given to the term by those of ordinary skill in the art, and that it is the use of the words in the *context of the written description* and *customarily by those skilled in the relevant art* that accurately reflects the "ordinary" and "customary" meaning of the terms (emphasis added). One having ordinary skill in the relevant art, or nutritional supplement products here, would understand the scope of the term "powder" and would interpret the term "powder" consistently with the generally accepted definition of the term to mean a substance consisting of ground or finely divided or dispersed solid particles.[1] There is simply nothing in

[1] *See* definitions of "powder" set forth in Answers.com web-page and Google.com compilation of definitions web page, copies attached hereto. *See also* definition of "powder" from Webster's Third New International Dictionary (1993), Merriam-Webster, Inc., Springfield MA, copy attached hereto.

the specification to indicate otherwise, nor is there a requirement, given the context of nutritional supplements, for Applicant to have defined the term "particle" with some sort of exacting size distribution. The Federal Circuit has stated that a "patentee need not define his invention with mathematical precision in order to comply with the definiteness requirement." *See In re Marosi*, 710 F.2d 799, (Fed. Cir. 1983). Moreover, Applicants note that the term "powder" is indicated in the specification to be one example of a "form" of a base (the dietary supplement here); the other possible forms include solid, semi-solid, and liquid; *see* p. 4, lines 17-18. To indicate that the base can be in "powder" form as one form in addition to solid or liquid forms is consistent with a definition of powder which indicates that powder particles behave intermediately between that of a solid and a liquid.[2] Given all of the above, Applicant respectfully asserts that the term is not indefinite, as one having ordinary skill in the art would understand the scope of the term in the context of nutritional supplements. Withdrawal of the rejections is respectfully requested.

Rejections under 35 U.S.C. § 102(b)

The Examiner rejected claims 26-29, 31, 33, 34, and 46-49 under 35 U.S.C. § 102(b) as anticipated by Morrissette et al., U.S. 2002/0150658 (hereinafter "Morrissette"). In particular, the Examiner alleged that Morrissette teaches a kit comprising a dietary supplement powder product, because the Examiner interpreted the term powder to read on "ready-to-eat cereal."

Applicant respectfully disagrees. A claim is anticipated under § 102(b) only if each and every limitation is disclosed in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 639 (Fed. Cir. 1989) and MPEP § 2131. Present claim 26 recites, among other things, a kit for making a nutritional supplement comprising a dietary supplement product, where the dietary supplement product is a powder. For the prior reasons of records as well as those discussed herein, Applicant respectfully asserts that one having ordinary skill in the art would not interpret the terms "dietary supplement" "powder" to read on any of the food components disclosed in Morrissette. Morrissette discloses that food components such as ready-to-eat cereals (e.g., whole wheat flakes) or the gasified candy known as "poprocks" can be

[2] *See* Google.com compilation of definitions the entry: unistates.com/rt/explained/glossary/rmtglossarypq.html

included in his food package system. As indicated above, a "powder" is generally accepted to be a *ground or finely divided* particulate composition. Neither "poprocks" nor a ready-to-eat cereal, such as the whole-wheat flakes of Morrissette, would be interpreted by those having ordinary skill in the art to be "ground" or "finely" divided particles, let alone as "dietary supplements" in "powder" form. Because Morrissette does not disclose each and every element of the claims, it cannot anticipate the claims. Applicants respectfully request withdrawal of the rejections under 35 U.S.C. § 102(b).

CONCLUSION

Applicants respectfully assert that the pending claims are in condition for allowance, which action is hereby requested. The Examiner is invited to telephone the undersigned attorney if such would expedite prosecution.

Please charge Deposit Account No. 06-1050 for $510 for the Petition for Extension of Time fee (3 months). Please apply any other charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: 8/8/07

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